

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CABLE NEWS NETWORK, INC.,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Case No. 1:17-cv-01167-JEB

MOTION TO ENFORCE THE COURT'S ORDER OF JUNE 7, 2019

The Court's June 7, 2019 Memorandum Opinion (Dkt. 86) and Order (Dkt. 85) should have brought "this long-running litigation" to an end. Dkt. 86 at 1. Instead, Defendant Federal Bureau of Investigation ("FBI") continues to choose "chutzpah" over obedience to this Court and fidelity to the law. Plaintiff Cable News Network, Inc. ("CNN") respectfully requests that the Court enter an Order directing the FBI to immediately turn over the documents subject to release pursuant to this Court's clear instructions, which the Court firmly reinforced this week, and awarding CNN its attorneys' fees incurred in litigating this Motion.

As the Court knows, as of nine weeks ago a relatively small amount of information remained sealed in the Comey Memos at issue in CNN's FOIA request and one of the two Archey Declarations at issue in CNN's motion for access to judicial records. On June 7, 2019, this Court granted CNN's motion for access to an unredacted copy of the First Archey Declaration and granted in part CNN's motion for summary judgment regarding the information previously withheld from the Comey Memos under redactions 1 through 5, 7, 22, and 23. *See*

generally Dkt. 86. The Court simultaneously entered a final judgment ordering this information to be released. Dkt. 85.

Despite this Court's Order, the FBI has not released any further portions of the documents. Nor has the FBI requested a stay of its obligations under the June 7, 2019 Order.¹

Instead, just two days after CNN wrote to Department of Justice counsel on July 3, 2019, requesting the FBI's compliance with the Court's Order, the FBI filed its dilatory and utterly meritless Rule 59(e) motion. *See* Dkt. 87. Counsel for the FBI then told counsel for CNN that the FBI did not have to comply with the Court's Order because the Court had not set a production schedule and because, in the FBI's view, the Rule 59(e) motion had stopped the clock and rendered this Court's judgment "non-final." *See* Dkts. 89-1 and 89-2.

Even now that the Court has denied the FBI's baseless motion, *see* Dkt. 94, the Government continues to stubbornly refuse to comply with this Court's Order. Counsel for CNN again wrote to counsel for the FBI on August 13, after the Court entered its Order firmly and finally rejecting the FBI's position, to request the documents' release within the week.² Counsel for the FBI responded that the agency *still* believes it need not heed this Court's order because the Court did not set "a specific date for production" and the time for the FBI to file an appeal has not expired.³

The law is not a game of "Mother, may I;" the Court need not set a deadline for

¹ Indeed, the Court summarily denied the only stay the FBI requested, of CNN's motion for a determination of the Government's liability to pay CNN's attorneys' fees. *See* Minute Order of August 12, 2019.

² A true and correct copy of CNN's counsel's August 13 letter is attached hereto as Exhibit A.

³ A true and correct copy of the FBI's counsel's August 13 email response is attached hereto as Exhibit B.

compliance with its orders. Contrary to the FBI's contumacious position, it is hornbook law "that all orders and judgments of courts must be complied with *promptly*. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, *he must comply promptly with the order pending appeal.*" *Maness v. Meyers*, 419 U.S. 449, 458 (1975) (emphasis added).

Because the Government continues to refuse to either comply with the Order or take the proper course of filing an appeal and seeking a stay, and because it filed a meritless Rule 59(e) motion in a frivolous attempt to forestall its compliance, CNN respectfully requests that this Court exercise its inherent authority and award CNN its attorneys' fees incurred in litigating this Motion. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (court has inherent authority to assess attorneys' fees "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'" (citation omitted); *Washington Hosp. Ctr. v. Serv. Employees Int'l Union Local 722, AFL-CIO*, 746 F.2d 1503, 1509-10 (D.C. Cir. 1984) ("the term 'vexatious' means that the losing party's actions were 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" (citation omitted)).

It is well past time for the FBI to stop stonewalling and comply with the law. Accordingly, CNN respectfully requests that this Court enter an Order directing the FBI to comply with the Court's June 7, 2019 Memorandum Opinion and Order by providing the unredacted Comey Memos and the unredacted First Archey Declaration to CNN immediately, and further directing the FBI to pay CNN's reasonable attorneys' fees incurred in litigating this Motion.

Dated: August 14, 2019

Respectfully submitted,

BALLARD SPAHR LLP

/s/ Charles D. Tobin

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Counsel for Plaintiff Cable News Network, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be filed and served electronically via the Court's ECF System upon counsel of record.

Dated: August 14, 2019

/s/ Charles D. Tobin
Charles D. Tobin

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[PROPOSED] ORDER

Upon consideration of Plaintiff's Motion to Enforce the Court's Order of June 7, 2019, all responses thereto, and the entire record herein, it is hereby **ORDERED** that:

1. Plaintiff's Motion is GRANTED;
2. Defendant is ORDERED to provide the unredacted documents referred to in this Court's Order of June 7, 2019 to Plaintiff immediately; and
3. Pursuant to this Court's inherent authority, Plaintiff's request for an award of its attorneys' fees in litigating this Motion is GRANTED.
4. The Plaintiff, within 5 days of this Order, shall provide to the Defendant an accounting of its reasonable attorneys' fees incurred in litigating this Motion. Defendant shall file any objections to that accounting within 5 days of receipt.

SO ORDERED.

HON. JAMES E. BOASBERG
United States District Judge

Exhibit A



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August 13, 2019

Via E-mail and USPS Express Mail (tracking #EL110272301US)

Carol Federighi
Senior Trial Counsel
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Re: Cable News Network, Inc. v. FBI, No. 1:17-cv-1167 (JEB)

Dear Carol:

This follows up on our July 3, 2019 letter and your responsive email a week later, on July 10.

In our letter, we noted that nearly a month had passed since the Court's June 7 Memorandum Opinion (Dkt. 86) and Order (Dkt. 85) granting summary judgment to CNN and instructing the FBI to release the Comey Memos, with only the redactions the Court's instruction provided.

Right after our letter, on July 5, the FBI directed you to file the Motion to Amend the Court's Opinion and Order (Dkt. 87). In your July 10 email, you then relied on the filing of that motion, asserting that it had rendered the Judgment "non-final". You advised us that, on this basis, the FBI would decline to follow the Court's instruction.

As you know, the Court yesterday denied the Motion to Amend (Dkt. 94), aptly characterizing the FBI's position as "chutzpah". In light of the finality of the Court's summary judgment Order, the strength of the Court's reinforced instruction, and the absence of any order staying compliance, it hardly behooves any of us – the FBI, CNN or the Court – to further delay the production that the Court ordered.

CNN requests that the FBI comply with the Court's Order and release to it the Comey Memos, in the form the Court instructed, by no later than the close of business this Friday, August 16. If we do not receive the documents by that time, CNN will move to compel and seek an award of its legal expenses.

Very truly yours,

A handwritten signature in blue ink that reads "Charles D. Tobin". The signature is fluid and cursive, with the first and last names being more prominent.

Charles D. Tobin

Exhibit B

From: Federighi, Carol (CIV) <Carol.Federighi@usdoj.gov>
Sent: Tuesday, August 13, 2019 4:29 PM
To: Tobin, Charles D. (DC) <TobinC@ballardspahr.com>
Cc: Vincent, Frances (DC) <VincentF@ballardspahr.com>
Subject: RE: Cable News Network, Inc. v. FBI, No. 1:17-cv-1167 (JEB)

⚠ EXTERNAL

Chuck –

Thank you for your letter of August 13, 2019, which does not acknowledge the entirety of my July 10, 2019, email. As I stated in that email, the Court's June 7 order did not include a deadline for production of the documents at issue. The Court was no doubt aware that the government would have sixty days after its decision within which to decide whether to appeal, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B), and yet it declined to enter a specific production schedule. The Court's recent opinion and order denying the government's motion pursuant to Rule 59(e) also do not contain a specific date for production. The government therefore continues to believe that, while proceedings in the district court have concluded, it does not have an obligation to produce the documents immediately and will not be doing so until the time for appeal has run or until resolution of any appeal if the government appeals.

Regards,
Carol

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